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**DEC 5 - 2005**

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**IN THE UNITED STATES BANKRUPTCY COURT**

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**FOR THE DISTRICT OF ARIZONA**

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**U.S. BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA**

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In re: )

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THE VILLAS AT HACIENDA DEL SOL, )

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INC., an Arizona corporation, )

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Debtor. )  
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)

21  
Chapter 11

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Case No. 4-05-01482-EWH

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ENVIRONMENTAL EARTHSCAPES, INC., )

24  
an Arizona corporation, dba The )

25  
Groundskeeper, )

26  
Plaintiff, )

27  
Adversary No. 05-00201

28  
v. )

29  
**MEMORANDUM DECISION**

30  
WESTERN PLAINS DEVELOPMENT CORP., )

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an Arizona corporation, and THE OHIO )

32  
CASUALTY INSURANCE COMPANY, an )

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Ohio corporation; JOHN DOES I-X; JANE )

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DOES I-X; ABC CORPORATIONS I-X; XYZ )

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PARTNERSHIPS I-X, )

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Defendants, )  
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)

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**INTRODUCTION**

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Litigation between the Debtor's general contractor and one of its subcontractors is  
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related to the Debtor's bankruptcy case because an adverse outcome to the litigation could  
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have an effect on the bankruptcy estate. Because the litigation has already been removed to  
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1 this court, there is no parallel proceeding in state court in favor of which this court must or  
2 could abstain. The equitable factors which govern remand, favor retention of this adversary  
3 proceeding in this court. The reasons for my conclusions are explained in the balance of this  
4 decision.

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7 **FACTUAL AND PROCEDURAL HISTORY**

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9 Movant, Environmental Earthscapes, Inc. (Environmental Earthscapes) has a subcontract  
10 with Western Plains Development Corp (WPD) on a construction project (Project) to build  
11 apartment units on property owned by the Debtor. WPD is the general contractor on the  
12 Project. The Debtor is not a party to the subcontract between WPD and Environmental  
13 Earthscapes. Under its contract with the Debtor, WPD was required to provide payment and  
14 performance bonds for the Project. In order to comply with that requirement, WPD obtained  
15 a \$12.7 million payment bond from Ohio Casualty Insurance Company, (Ohio Casualty). WPD  
16 is named as the principal on the bond and the Debtor is named as the obligee.  
17  
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19 In the spring of 2004, a dispute arose between the Debtor and WPD. The Debtor quit  
20 funding WPD's payment and change order requests. At or about the same time, WPD quit  
21 paying the subcontractors on the Project. Environmental Earthscapes subsequently sued Ohio  
22 Casualty and WPD in Pima County Superior Court (Environmental Earthscapes Litigation).

23 After the Debtor filed for Chapter 11 relief in March 2005, Ohio Casualty and/or WPD  
24 filed notices of removal of all pending state court proceedings brought by subcontractors  
25 against WPD and/or Ohio, including the Environmental Earthscapes Litigation. All of the  
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removal notices state that the litigation being removed is “related to” Debtor’s bankruptcy case. Environmental Earthscapes filed a Motion for Remand of Removed Claim in September of 2005.<sup>1</sup> After the Environmental Earthscapes Litigation was removed, Ohio Casualty filed an answer and third-party complaint against the Debtor, alleging that to the extent Ohio Casualty was found liable to Environmental Earthscapes, the Debtor “is or may” be liable to Ohio Casualty under the terms of WPD’s contract with the Debtor as well as under principles of contribution and indemnity.

Environmental Earthscapes’ motion, along with motions to remand filed by a number of other subcontractors on the Project, was heard on November 17, 2005. The matter is now ready for decision.

## DISCUSSION

In its motion and reply, Environmental Earthscapes seeks remand under 28 U.S.C. § 1334(c)(2).

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<sup>1</sup> In addition to Environmental Earthscapes, Best Paving, Inc. (Best), M&B Mechanical, Inc. (M&B Mechanical), NWR Enterprises, Inc. dba Brikon Masonry (Brikon), JFN Mechanical Contracting, Inc. (JFN Mechanical), Design Plastering, Inc. (Design Plastering) and Ron’s Concrete Construction, Inc. dba Hector’s Concrete (Ron’s Concrete) all filed suit against WPD and/or Ohio Casualty in Pima County Superior Court. Brikon, Best, and M&B Mechanical, joined by Ron’s Concrete, filed motions to remand their lawsuits to state court. M&B Mechanical has withdrawn its Motion. JFN Mechanical and Design Plastering have not filed motions to remand. The motions for remand filed by Best, Brikon and Ron’s Concrete are the subjects of separate memorandum decisions and orders entered this date.

1           A.     Abstention Under 28 U.S.C.1334(c) Does Not Apply

2           In its motion, Environmental Earthscapes asserts that mandatory abstention under  
3           28 U.S.C. § 1334(c)(2) requires that the Environmental Earthscapes Litigation be remanded  
4           to state court. However, in Security Farms v. Int'l Brotherhood of Teamsters, 124 F.3d  
5           999,1009 (9<sup>th</sup> Cir. 1997), the Ninth Circuit held that abstention can exist only when there is  
6           a parallel proceeding in state court.  
7

8           Section 1334(c) abstention should be read in *pari materia* with section 1452(b)  
9           remand, so that [section 1334(c)] applies only in those cases in which there is  
10          a related proceeding that either permits abstention in the interest of comity,  
11          section 1334(c)(1) or that by legislative mandate, requires it,  
12          section 1334(c)(2). Id. at 1010.

13          See also In re Lazar, 237 F.3d 967, 981 (9<sup>th</sup> Cir. 2001).

14          Under the holding in Security Farms, because Ohio Casualty and WPD have removed  
15          the Environmental Earthscapes Litigation, there is no parallel proceeding in state court. There  
16          is, therefore, no “pendant state action” in favor of which the court must or may abstain. Id. at  
17          1009. Accordingly, Environmental Earthscapes’ motion is not governed by Section 1334(c).

18           B.     Remand under 28 U.S.C. § 1452(b)

19          A cause of action or a claim may be remanded to state court “on any equitable ground.”<sup>2</sup>  
20          The “any equitable ground” remand standard is an unusually broad grant of authority committed  
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25          <sup>2</sup> 28 U.S.C. § 1452(b) provides as follows: “The court to which such a claim or cause of action  
26          is removed may remand such claim or cause of action on any equitable ground. An order entered under  
27          this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by  
28          appeal or otherwise by the court of appeals under section 158(d), 1291 or 1292 of this title or by the  
Supreme Court of the United States under section 1254 of this title.”

1 to the sound discretion of the bankruptcy judge. In re McCarthy, 230 B.R. 414 (9<sup>th</sup> Cir. B.A.P.  
2 1999).

3 In exercising this “broad grant” of discretion, courts have looked to a number of factors  
4 to determine whether remand would be equitable in a given case. These factors include:

5 Judicial economy, comity and respect for state law decision making capabilities,  
6 the impact that remand would have upon the orderly administration of the  
7 debtor’s bankruptcy estate, the effect of bifurcating claims and parties to an  
8 action and the possibility of inconsistent results, the predominance of state law  
9 issues and non-debtor parties, and the extent of any prejudice to non-debtor  
10 parties. In re TIG Insurance Co., 264 B.R. 661, 666 (Bankr. C.D. Cal. 2001).  
(citations omitted).

11 In this case, contract and surety law issues governed by state law predominate.  
12 However, the issue of whether Environmental Earthscapes is entitled to damages under Ohio  
13 Casualty’s bond or its subcontract with WPD will affect the Debtor’s bankruptcy case. Ohio  
14 Casualty’s indemnification rights against WPD and/or the Debtor on the payment bond and  
15 WPD’s contractual and/or equitable indemnification rights against the Debtor as the owner of  
16 the Project, mean that any adverse outcome of the Environmental Earthscapes Litigation to  
17 Ohio Casualty and/or WPD will have an impact on the Debtor’s bankruptcy estate because it  
18 will increase the amount of WPD’s and/or Ohio Casualty’s claims. The fact that WPD’s claims  
19 against the Debtor will have to be severed if the Environmental Earthscapes Litigation is  
20 remanded also raises concerns about the efficient use of judicial resources both in this court  
21 and in state court.

22 Furthermore, if the Environmental Earthscapes Litigation is remanded, there is a  
23 possibility of inconsistent results between this court and the state court in interpreting similar  
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1 contractual provisions. Ohio Casualty and WPD have asserted in all of the pending litigation  
2 with the Project's subcontractors that a "pay when paid" clause in the subcontracts means that  
3 no amounts are currently due and owing from WPD (or Ohio Casualty) to any of the Project  
4 subcontractors. One subcontractor, M&B Mechanical has withdrawn its motion for remand.  
5 Two others have failed to seek remand. Therefore, I will be forced to address WPD's "pay  
6 when paid" defense. However, if the Environmental Earthscapes Litigation is remanded, the  
7 state court also has to address the "pay when paid" defense" raising the very real possibility of  
8 inconsistent results which could have an adverse effect on the Debtor and its creditors.  
9

10       This court is the only forum where all of the subcontractors and potential resulting  
11 indemnification claims against the Debtor can be heard. While the litigation can be heard  
12 relatively quickly and efficiently in this court, absent consent of the parties and Environmental  
13 Earthscapes has not consented, this court cannot enter final orders or judgments in "related to"  
14 proceedings. See 28 U.S.C. § 157(c)(1). As a result, the Environmental Earthscapes Litigation  
15 may not necessarily conclude more quickly in this court than in state court, but I find that the  
16 possibility of inconsistent results between the federal and state forums and the potential  
17 significant impact that such inconsistent results could have on the bankruptcy estate, outweigh  
18 any delay caused by the requirement that this court submit its proposed findings of fact and  
19 conclusions of law to the District Court.  
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## **CONCLUSION**

Under Ninth Circuit case law, abstention under Section 1334(c) does not apply to  
Environmental Earthscapes' Motion for Remand of Removed Claim. Under the broad  
equitable principles which govern remanding of removed matters under 28 U.S.C. § 1452(b),  
I find that the Environmental Earthscapes Litigation should not be remanded to state court  
because it will require an inefficient severance of claims and open up the possibility of  
inconsistent rulings on similar matters by the state court and this court. Accordingly, the  
motion is denied.

11        The foregoing constitute my findings of fact and conclusions of law as required by Fed.  
12  
13 R. Bankr. P. 7053. A separate order denying Environmental Earthscapes' Motion for Remand  
14 of Removed Claim will be entered this date.

15 DATED this 5<sup>th</sup> day of December, 2005.

Eileen W. Hollowell  
Eileen W. Hollowell  
U.S. Bankruptcy Judge

21 Copy of the foregoing served as indicated  
22 below this 5 day of December, 2005, to:

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